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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 KIMBERLY D.,

9 Plaintiff,

10 v.

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

Case No. C19-5492-MLP

ORDER

13  
14 **I. INTRODUCTION**

15 Plaintiff seeks review of the denial of her application for Supplemental Security Income.  
16 Plaintiff contends the administrative law judge (“ALJ”) erred in discounting her testimony,  
17 assessing the lay evidence, and assessing medical opinions.<sup>1</sup> (Dkt. # 10 at 2.) As discussed  
18 below, the Court AFFIRMS the Commissioner’s final decision and DISMISSES the case with  
19 prejudice.

20 **II. BACKGROUND**

21 Plaintiff was born in 1969, has a high school diploma, and has worked as a store  
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23 <sup>1</sup> Plaintiff also assigns error to the ALJ’s residual functional capacity (“RFC”) assessment and step-five findings, but in doing so only reiterates arguments made elsewhere. (Dkt. # 10 at 2, 17-18.) Accordingly, these issues need not be addressed separately.

1 cashier/stocker, seafood processor, and courier. AR at 39, 234-40, 252. Plaintiff was last  
2 gainfully employed in January 2009. *Id.* at 252.

3 In January 2015, Plaintiff applied for benefits, alleging disability as of January 1, 2015.  
4 AR at 96, 221-28. Plaintiff's application was denied initially and on reconsideration, and  
5 Plaintiff requested a hearing. *Id.* at 138-51, 156-65. After the ALJ conducted a hearing on May  
6 30, 2018 (*id.* at 34-67), the ALJ issued a decision finding Plaintiff not disabled. *Id.* at 17-29.

7 Utilizing the five-step disability evaluation process,<sup>2</sup> the ALJ found:

8 Step one: Plaintiff has not engaged in substantial gainful activity since January 6, 2015,  
9 the application date.

10 Step two: Plaintiff's diabetes mellitus, ankle degenerative joint disease, pes planus,  
11 anxiety not otherwise specified, post-traumatic stress disorder, and major depressive  
12 disorder are severe impairments.

13 Step three: These impairments do not meet or equal the requirements of a listed  
14 impairment.<sup>3</sup>

15 RFC: Plaintiff can perform light work with additional limitations: she must be permitted  
16 to change from sitting to standing or standing to sitting approximately every 30 minutes  
17 at the workstation. She can occasionally push and pull bilaterally. She can never climb  
18 ladders, ropes, or scaffolds. She can never crawl. She can occasionally climb ramps and  
19 stairs, balance, stoop, kneel, and crouch. She can occasionally reach overhead. She must  
20 avoid concentrated exposure to pulmonary irritants and hazards. She is limited to simple,  
21 repetitive, routine tasks consistent with unskilled work. She cannot interact with the  
22 public. She can occasionally interact with co-workers and supervisors. Her regular job  
23 duties cannot include driving.

Step four: Plaintiff does not have past relevant work.

Step five: As there are jobs that exist in significant numbers in the national economy that  
Plaintiff can perform, Plaintiff is not disabled.

AR at 17-29.

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<sup>2</sup> 20 C.F.R. § 416.920.

<sup>3</sup> 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 As the Appeals Council denied Plaintiff's request for review, the ALJ's decision is the  
2 Commissioner's final decision. AR at 1-6. Plaintiff appealed the final decision of the  
3 Commissioner to this Court. (Dkt. # 4.)

### 4 III. LEGAL STANDARDS

5 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social  
6 security benefits when the ALJ's findings are based on legal error or not supported by substantial  
7 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a  
8 general principle, an ALJ's error may be deemed harmless where it is "inconsequential to the  
9 ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
10 (cited sources omitted). The Court looks to "the record as a whole to determine whether the error  
11 alters the outcome of the case." *Id.*

12 "Substantial evidence" is more than a scintilla, less than a preponderance, and is such  
13 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
14 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
15 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical  
16 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d  
17 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may  
18 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v.*  
19 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one  
20 rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

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#### IV. DISCUSSION

##### A. The ALJ Did Not Err in Discounting Plaintiff's Subjective Allegations

The ALJ discounted Plaintiff's subjective allegations, finding them inconsistent with the record, which showed mild physical and mental exam findings and lack of treatment. AR at 23-25. Plaintiff contends that these reasons are not clear and convincing, as required in the Ninth Circuit.<sup>4</sup> See *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

Plaintiff argues that the ALJ's identification of inconsistent physical exam findings, as well as "overall lack of treatment beyond conservative means and intermittent medical visits", represents a misapplication of the objective evidence test, because an ALJ cannot reject a claimant's "testimony about the extent or severity of her symptoms based solely upon whether objective evidence supports the degree of limitations alleged by [a claimant]." (Dkt. # 10 at 10.) But the ALJ here found that the record was *inconsistent* with the Plaintiff's alleged physical limitations, rather than simply finding a lack of corroboration in the record. See *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) ("While subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the medical evidence is still a relevant factor in determining the severity of the claimant's pain and its disabling effects."). Plaintiff's opening brief does not identify any error in the ALJ's findings that the physical examinations were inconsistent with Plaintiff's allegations, or that Plaintiff's minimal, conservative treatment for her physical conditions undermined her allegations of disabling physical limitations. These findings are supported by substantial evidence and serve as clear and convincing reasons to discount Plaintiff's allegations.

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<sup>4</sup> Plaintiff's opening brief also summarizes her own statements at length. (Dkt. # 10 at 11-15.) This summary is an unnecessary use of briefing and fails to advance any legal argument.

1           The ALJ also accurately found that Plaintiff received minimal mental health treatment,  
2 frequently canceling therapy appointments due to illness and eventually was discharged due to  
3 loss of contact, which reasonably undermined her allegations of disabling mental symptoms. AR  
4 at 25 (citing *id.* at 386, 389, 391, 393, 396, 476). Plaintiff suggests that the ALJ should not have  
5 discounted her testimony based on lack of treatment without considering the reasons provided to  
6 explain that lack of treatment (dkt. # 10 at 11), but cites no portion of the record where the  
7 Plaintiff offered such a reason. Plaintiff frequently cited physical illness as the reason why she  
8 canceled appointments (AR at 386, 393, 476, 484), but that does not suggest a lack of insight  
9 into her mental illness or any other reason that would contradict the inference drawn by the ALJ.  
10 Under these circumstances, Plaintiff has not shown that the ALJ erred in discounting Plaintiff's  
11 mental allegations based on minimal engagement with treatment. *Molina*, 674 F.3d at 1113-14.

12           The ALJ also noted that Plaintiff's counselor documented Plaintiff changing her version  
13 of a story (AR at 406-07), and the ALJ inferred from this note that Plaintiff is not a reliable  
14 historian. *Id.* at 25. Plaintiff agrees that she is not a reliable historian (dkt. # 10 at 11), but  
15 contends that her unreliability is not due to an intentional desire to mislead. (Dkt. # 12 at 7.) The  
16 ALJ did not find that Plaintiff intentionally misled either her counselor or the ALJ, however: the  
17 ALJ reasoned that because Plaintiff changed the facts of a story during a session with a  
18 counselor, the inconsistencies in her allegations "undermine the weight that can be given to her  
19 subjective symptom reports." AR at 25. This is a reasonable inference, even if a different  
20 inference could also be drawn, and thus Plaintiff has not shown that the ALJ erred in this finding  
21 or in discounting Plaintiff's allegations based on inconsistencies. *See, e.g.,* Social Security  
22 Ruling ("SSR") 16-3p, 2017 WL 5180304, at \*8 (Oct. 25, 2017) ("[W]e will consider the  
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1 consistency of the individual’s own statements” in determining the weight to be assigned to a  
2 claimant’s testimony).

3 Because the ALJ provided these clear and convincing reasons to discount Plaintiff’s  
4 testimony, the Court affirms the ALJ’s assessment of Plaintiff’s testimony and finds that any  
5 errors in the ALJ’s assessment are harmless. *See Carmickle v. Comm’r of Social Sec. Admin.*,  
6 533 F.3d 1155, 1162-63 (9th Cir. 2008).

7 **B. The ALJ Did Not Harmfully Err as to Lay Evidence**

8 The ALJ discussed the lay statements from Plaintiff’s family members (AR at 274-81,  
9 312-21), summarizing their statements, and finding them to be inconsistent with the opinion  
10 report of an examining psychologist. *Id.* at 27. Inconsistency with a medical opinion is a legally  
11 sufficient reason to discount a lay statement. *See Bayliss*, 427 F.3d at 1218.

12 Plaintiff contends that the lay statements are not “meaningfully inconsistent” with Dr.  
13 Alvord’s opinion (dkt. # 10 at 17), but the Court disagrees. Plaintiff’s family members described  
14 an inability to drive, along with significant social limitations, whereas Dr. Alvord noted that  
15 Plaintiff reported no driving limitations and he found that her social limitations were only mild to  
16 moderate. *Compare* AR at 277, 279, 312, 314, 319 *with id.* at 436, 438. Thus, the Court finds  
17 that the ALJ did not err in discounting the lay statements based on inconsistency with a medical  
18 opinion.

19 Plaintiff also argues that the ALJ erred in failing to discuss the observations of an agency  
20 employee, who described Plaintiff as having difficulty with understanding and talking, as she  
21 “was easily confused, had obvious speech impediment.” AR at 247-48. This observation does not  
22 constitute significant, probative evidence that the ALJ rejected, and was required to explicitly  
23 discuss, because the problems described by the agency employee are arguably accounted for in

1 the ALJ's RFC assessment. *See Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir.  
2 2003) (ALJ "not required to discuss evidence that is neither significant nor probative"); *Flores v.*  
3 *Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (holding that the ALJ "may not reject 'significant  
4 probative evidence' without explanation" (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th  
5 Cir. 1984))). The ALJ included cognitive and social limitations in the RFC assessment (AR at  
6 22) that accommodates Plaintiff's problems understanding and talking that the agency employee  
7 observed. Although no diagnosis of a speech impediment is found in the record, Plaintiff's  
8 attorney explained at the hearing that she has trouble speaking when she is nervous around  
9 people (*id.* at 38), and thus the ALJ's social restrictions also address the speech issue.

10 In her reply brief, Plaintiff states that the ALJ's RFC assessment does not fully account  
11 for the agency employee's observations, but does not explain how this is the case. (Dkt. # 12 at  
12 8.) Without providing any legal argument or analysis of this issue, Plaintiff has not met her  
13 burden to show that the ALJ harmfully erred in failing to discuss the employee's observations.

#### 14 **C. The ALJ Did Not Err in Assessing Medical Evidence**

15 Plaintiff challenges the ALJ's assessment of multiple medical opinions, each of which the  
16 Court will address in turn.

##### 17 *1. Legal Standards*

18 Where not contradicted by another doctor, a treating or examining doctor's opinion may  
19 be rejected only for "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
20 1996) (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a  
21 treating or examining doctor's opinion may not be rejected without "specific and legitimate  
22 reasons' supported by substantial evidence in the record for so doing." *Lester*, 81 F.3d at 830-31  
23 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

1                   2.       *Kimberly Wheeler, Ph.D.*

2           Dr. Wheeler examined Plaintiff in April 2014 and completed a DSHS form opinion  
3 describing her symptoms and limitations. AR at 325-29. This opinion predates the January 1,  
4 2015 alleged onset date, and thus has limited relevance, as the ALJ noted among other reasons to  
5 discount Dr. Wheeler’s opinion. *Id.* at 25. This is a specific, legitimate reason to discount Dr.  
6 Wheeler’s opinion. *See Carmickle*, 533 F.3d at 1165 (“Medical opinions that predate the alleged  
7 onset of disability are of limited relevance.”). Even if the other reasons provided by the ALJ are  
8 erroneous, as argued by Plaintiff, this reason is valid and any errors are harmless. *See Id.* at  
9 1162-63.

10          Plaintiff suggests that the timing of Dr. Wheeler’s opinion is not a valid reason to  
11 discount Dr. Wheeler’s opinion because at the time of the examination, Plaintiff had a disability  
12 claim pending in the Ninth Circuit in which she alleged an onset date of January 1, 2000. But the  
13 Ninth Circuit affirmed the Commissioner’s denial of that application, and specifically affirmed  
14 the prior ALJ’s discounting of Dr. Wheeler’s opinion. *See [Kimberly D.] v. Berryhill*, 762 Fed.  
15 Appx. 439, 441 (9th Cir. Mar. 11, 2019). Thus, Plaintiff’s reference to her prior application is  
16 unavailing here.

17                   3.       *Scott Alvord, Psy.D.*

18          Dr. Alvord examined Plaintiff in August 2016 and wrote a narrative report describing her  
19 symptoms and limitations. AR at 434-39. Dr. Alvord described at most mild-to-moderate deficits  
20 in Plaintiff’s mental capabilities. *Id.* at 438. The ALJ gave significant weight to Dr. Alvord’s  
21 opinion. *Id.* at 26.

22          Plaintiff argues that the ALJ erred in “failing to include in his [RFC] assessment all of the  
23 limitations described by Dr. Alvord” (dkt. # 10 at 6), but Plaintiff does not identify any particular

1 omitted limitation. It is not clear that any of the limitations identified by Dr. Alvord would be  
2 inconsistent with the ALJ's RFC assessment, which includes cognitive and social limitations.  
3 *Compare* AR at 22 *with id.* at 438. Because the deficits described by Dr. Alvord are not  
4 necessarily more severe than those described by the ALJ, Plaintiff has not shown that the ALJ  
5 erred in assessing Dr. Alvord's opinion. *See* SSR 96-8p, 1996 WL 374184, at \*7 (Jul. 2, 1996)  
6 ("If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must  
7 explain why the opinion was not adopted.").

8 4. *Patricia Sylwester, M.D.*

9 Dr. Sylwester examined Plaintiff in August 2016 and wrote a narrative report describing  
10 Plaintiff's physical symptoms and limitations. AR at 430-33. The ALJ credited most of Dr.  
11 Sylwester's opinion, but rejected the finding that Plaintiff was limited to standing/walking for  
12 less than four hours in a workday due to radicular pain. AR at 26, 433. The ALJ found that  
13 limitation to be unsupported by any objective evidence, and inconsistent with the generally  
14 normal physical examinations as well as Plaintiff's activities. AR at 26.

15 Plaintiff argues that the ALJ's reasons are not legitimate because Dr. Sylwester "was able  
16 to base her opinion on her independent clinical findings, and her findings are consistent with her  
17 opinion." (Dkt. # 10 at 7.) But Dr. Sylwester did not cite clinical findings as the basis for her  
18 opinion regarding Plaintiff's standing/walking limitations: she cited Plaintiff's self-reported pain  
19 complaints. AR at 433. The ALJ gave clear and convincing reasons to discount Plaintiff's self-  
20 reported physical pain, as discussed *supra*.

21 Furthermore, as noted by the Commissioner, Dr. Sylwester's clinical findings did not  
22 necessarily indicate that Plaintiff could not stand/walk more than four hours per day: Plaintiff  
23 demonstrated normal gait, full leg strength, and normal range of motion. AR at 431-32. There

were some abnormalities on examination, such as the inability to hop on one foot and unsteady tandem walk (*Id.* at 432), but those findings do not necessarily indicate that Plaintiff was unable to walk for more than four hours per day.<sup>5</sup>

## 5. Miscellaneous Medical Findings

Plaintiff's opening brief summarizes miscellaneous medical findings but does not tie them to an alleged error in the ALJ's decision. (Dkt. # 10 at 7-9.) Because this summary is unaccompanied by legal argument, the Court need not address this section further.

## V. CONCLUSION

For the foregoing reasons, the Commissioner's final decision is **AFFIRMED** and this case is **DISMISSED** with prejudice.

Dated this 10th day of February, 2020.

M. J. Peterson

MICHELLE L. PETERSON  
United States Magistrate Judge

<sup>5</sup> Furthermore, the ALJ found at step five that Plaintiff was able to perform two sedentary jobs, which would seem to render harmless any error in the ALJ's rejection of the standing/walking limitation opined by Dr. Sylwester. AR at 28.